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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 663

FLORIDA CITRUS COMMISSION, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1 (c) of the Revised Rules of this Court, appellees United States of America and Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a final judgment entered September 7, 1956, by a three-judge district court convened pursuant to 28 U. S. C. 2284 and 2325, dismissing an action brought by appellants to set aside an Interstate Commerce Commission order which authorized a general 15% increase in charges by railroads for refrigeration services.

Following World War II, the Commission authorized a number of general overall percentage in-

creases in interstate railroad freight rates. In connection with the first two of such increases, the Commission also authorized percentage increases in charges for refrigeration services.[1] However, in the subsequent general revenue proceedings, the Commission refused to authorize further increases in such charges, on the ground that the carriers had failed to show that existing charges were inadequate. See *Proposed Increased Refrigeration Charges,* 297 I. C. C. 505, 509 (Jur. St. App. II).

The carriers then made a comprehensive cost study of their refrigeration services. In August 1953, on the basis of that study, they filed with the Commission a petition for further increases in charges for such services. After lengthy administrative proceedings, the Commission authorized a general increase of 15% (which was less than the increases proposed by the carriers) and accordingly modified previous outstanding orders so as to permit the establishment of the increase thus authorized.

Although the Commission found (*Proposed Increased Refrigeration Charges, supra,* p. 553) that the cost study had shown "a substantial deficit" (averaging 23%) in total railroad revenues from refrigeration services, it held that the increases proposed by the carriers could not be approved because they would result in "substantial reduction in revenues" through diversion or other loss of traffic (*ibid.*). It concluded that a general increase of 15% in refrigeration

[1] Pursuant to Section 6 (1) of the Interstate Commerce Act, charges for refrigeration services are stated separately from the line-haul rates.

charges would enable the carriers "to provide adequate refrigeration service and specifically to meet increased costs of rendering that service * * *" (*id.*, p. 554).[2] The Commission further stated (*ibid.*) that, after such increases had been made, the carriers "should conduct thorough and comprehensive studies that will permit sound determinations as to the effect of increases upon the movement of traffic, and as to any inequities or improper relations in refrigeration charges that may have developed from changed conditions since their original establishment."

In unanimously sustaining the Commission's order, the district court held (Jur. St. 5a–11a) that the Commission proceeding was a "general revenue" proceeding rather than one to determine the reasonableness of specific rates; that the court therefore would consider only whether "the overall general increases as authorized will be just and reasonable" (Jur. St. 10a), and not the "lawfulness of particular charges" (Jur. St. 9a);[3] and that the Commission's findings were supported by substantial evidence and "afford an adequate basis" for its conclusion that an overall increase of 15% in refrigeration charges was justified (Jur. St. 13a).

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[2] The Commission found (*ibid.*) that a 15% increase would yield "additional annual revenue approximating $6,000,000."

[3] The court pointed out (Jur. St. 13a–16a) that, despite its affirmance of the Commission's order, appellants nevertheless could, by complaint filed under Sections 13 and 15 of the Act, "present to the Commission their contentions that particular rates initiated pursuant to its order were unreasonable and discriminatory" (Jur. St. 8a).

ARGUMENT

1. Appellants contend (Jur. St. 25–36) that the district court refused to "consider the merits of the case" and dismissed the complaint for want of a "justiciable issue" (Jur. St. 4). The court's opinion shows on its face, however, that the court fully considered the validity of the Commission's order (Jur. St. 4a–17a), and dismissed the complaint because it held that the findings were sufficient to support the order and had an adequate evidentiary basis (Jur. St. 13a). Appellants' contention, therefore, is but a restatement of their basic position that the district court erred in treating the Commission proceeding as a "general revenue" case rather than as a "rate" case, and consequently in considering only the propriety of the general increase and in refusing to consider the reasonableness of the application of that increase to individual rates.

We submit, however, that the district court correctly held that this was a "general revenue" case. The application for increased charges was filed by substantially all the nation's railroads, and their comprehensive cost study dealt with the problem in terms of averages for all carriers, not in terms of particular rates. The Commission treated the application as one for a general increase in revenues from an important segment of carrier operations. It stated that the evidence showed "a substantial deficit in the *total of the revenue from refrigeration services,*" and that a 15% increase in charges for refrigeration generally would yield "additional annual revenue approximating $6,000,000" (297 I. C. C. at 553, 554, emphasis

added). Furthermore, the Commission's decision contemplated that the carriers would make additional studies to permit correction of any inequities that might arise out of the application of the increased charges to particular rates (see *supra*, p. 3).

The Commission was fully warranted in dealing with charges for refrigeration services on a nation-wide, and not an individual rate, basis. "Where the Commission seeks to deal generally with rates and revenues in a large area on evidence typical of the area as a whole, it may proceed by way of a general order supported by sufficient evidence applicable to the whole territory." *King* v. *United States*, 344 U. S. 254, 275. The principle is no less applicable because the order deals with charges for refrigeration services rather than "rates and revenues" generally. The Commission had dealt with the problem by general order on two previous occasions, in connection with authorizing general increases in interstate rates (see *supra*, p. 2), pursuant to its settled policy that "the handling of refrigerated traffic should be considered as an integrated national service * * *." *Charges for Protective Service to Perishable Freight*, 215 I. C. C. 684, 730. Indeed, "the administrative arm of the Commission [would be] paralyzed, if instead of adjudicating upon the rates in a large territory on evidence deemed typical of the whole rate structure, it were obliged to consider the reasonableness of each individual rate before carrying into effect the necessary increased schedule." *United States* v. *Louisiana*, 290 U. S. 70, 75–76.

2. Since this was a "revenue" case, the district court properly limited itself to determining the validity of the general increase, and refused to consider the effect of such increase upon particular rates. For an order authorizing a general increase in revenues, otherwise valid, does not become invalid because of "possible uncertainty of application in isolated instances * * *. The appropriate remedy under such conditions is an application to the Commission [under Sections 13 and 15] requesting it to suspend the operation of the order insofar as it may affect the isolated cases; and, if necessary, to enter an independent order dealing specifically with them." *Georgia Commission* v. *United States*, 283 U. S. 765, 772; see also *Algoma Coal & Coke Company* v. *United States*, 11 F. Supp. 487 (E. D. Va.).[4]

3. The district court correctly held that the Commission's order authorizing a 15% increase in charges for refrigeration service was supported by adequate findings which, in turn, had substantial evidentiary support.

a. The Commission found that the existing charges produced revenues which were substantially less than the cost of rendering the service, and that a 15% increase, which it estimated would produce additional annual revenue of $6,000,000, would enable the car-

[4] Appellants are not precluded from making such application because of the absence of an explicit Commission finding to that effect. For, as the district court pointed out (Jur. St. 10a), a shipper's right to file such applications, and the Commission's duty to rule upon them, flow from the Act itself, and "[t]he Commission has not, and indeed could not, foreclose the right or renounce the duty in an order authorizing general increases in transportation rates or charges."

riers to provide adequate refrigeration service and to meet the increased costs of rendering that service (see *supra*, pp. 2–3). Those findings were adequate to support the order. "It is not necessary, for general revenue purposes, to establish for each item in each freight rate a fully developed rate case." *King* v. *United States, supra.*

b. In authorizing the increase, the Commission relied primarily upon the carriers' comprehensive and detailed study of the cost of rendering the service. Appellants now challenge this cost study as inadequate to support the order (Jur. St. 35–36). But "[w]hether or not the cost study was representative, whether the study should have been more refined, and whether it should have been supplemented as appellants desired, are questions of fact the determination of which is within the competence of the Commission." *Illinois Commerce Commission* v. *United States,* 292 U. S. 474, 481; see *New York* v. *United States,* 331 U. S. 284, 328. The district court fully reviewed appellants' attacks on the adequacy of the cost study as a basis for the order, pointed out that the Commission "found a vast multitude of specific facts" (Jur. St. 12a) which "afford an adequate basis for the Commission's conclusions" (Jur. St. 13a), and concluded that such factual findings were "supported by substantial evidence" (*ibid.*).

This Court has indicated that the initial reviewing court has "primary responsibility" (*National Labor Relations Board* v. *Pittsburgh S. S. Co.,* 340 U. S. 498, 502) for determining "[w]hether on the record as a whole there is substantial evidence to support agency

findings," and that it will re-examine the record only in the "rare instance" where the reviewing court has "misapprehended or grossly misapplied" the governing criteria. *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U. S. 474, 491. We submit that there are no special circumstances here which would warrant a further canvassing of the record. See *New England Divisions Case,* 261 U. S. 184, 203–204; *Radio Corp.* v. *United States,* 341 U. S. 412, 415.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision below is correct and that this appeal presents no substantial question. The judgment of the district court should therefore be affirmed.

J. LEE RANKIN,
Solicitor General.
VICTOR R. HANSEN,
Assistant Attorney General.
DANIEL M. FRIEDMAN,
Attorney.

ROBERT W. GINNANE,
General Counsel,
CHARLIE H. JOHNS,
Assistant General Counsel,
Interstate Commerce Commission.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 663

FLORIDA CITRUS COMMISSION, GROWERS AND SHIPPERS LEAGUE OF FLORIDA, FLORIDA FRUIT AND VEGETABLE ASSOCIATION, FLORIDA RAILROAD AND PUBLIC UTILITIES COMMISSION, CALIFORNIA CITRUS LEAGUE, WESTERN GROWERS ASSOCIATION, *et al., Appellants,*

v.

UNITED STATES OF AMERICA, *et al., Appellees.*

Appeal from the United States District Court for the Northern District of Florida, Tallahassee Division

BRIEF OF APPELLANTS IN OPPOSITION TO MOTIONS TO AFFIRM BY (a) UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION (b) RAILROAD APPELLEES, AND (c) ARMOUR AND COMPANY, ET AL.

M. W. WELLS
MAGUIRE, VOORHIS & WELLS
135 Wall Street (P. O. Box 633)
Orlando, Florida

LEWIS W. PETTEWAY
General Counsel
R. Y. PATTERSON JR.
Assistant General Counsel
FLORIDA RAILROAD & PUBLIC UTILITIES COMMISSION
Tallahassee, Florida

KARL D. LOOS
POPE, BALLARD & LOOS
707 Munsey Building
Washington 4, D. C.

FRANK C. BROOKS
HUGH T. MATTHEWS, JR.
CALLAWAY, REED, KIDWELL & BROOKS
305 Empire Bank Bldg.
Dallas, Texas

February 19, 1957

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

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No. 663

FLORIDA CITRUS COMMISSION, *et al.*, *Appellants*,

v.

UNITED STATES OF AMERICA, *et al.*, *Appellees*.

Appeal from the United States District Court for the Northern District of Florida, Tallahassee Division

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BRIEF OF APPELLANTS IN OPPOSITION TO MOTIONS TO AFFIRM FILED BY (a) UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION (b) THE RAILROAD APPELLEES, AND (c) THE MEAT PACKERS, ARMOUR AND COMPANY, ET AL.

This Appellant's brief in opposition to the three motions to affirm, is filed on behalf of the citrus and vegetable industries of Florida and California, the principal users in the nation of the "stated charge" or "section 2" refrigeration services. These Section

2 charges are the ones which are detrimentally affected by the order of the Interstate Commerce Commission in its Docket No. 31342, whereby long outstanding orders were set aside and a uniform nation-wide increase of 15% in all refrigeration charges was authorized and became effective.

Refrigeration or icing service is transportation; but such service is merely an auxiliary or accessorial one. The statute contemplates that the "icing charges" shall be stated in the tariff "separately" from the primary or line-haul transportation charges (49 U.S.C.A. Sec. 6 (1)). Since the extensive investigations by the Interstate Commerce Commission in Dockets 17936 and 20769,[1] the separation of refrigeration charges from line-haul rates has been required, and the specific elements of cost of refrigeration service were and are plainly stated, such elements being applicable according to the particular service requirements.[2] The term "cost" as applied to refrigeration

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[1] Docket 17936, *Refrigeration Charges on Fruits, etc. from the South*, 151 I.C.C. 649, decided Feb. 12, 1929. Docket 20769, *Charges for Protective Service to Perishable Freight*, 215 I.C.C. 684, decided June 2, 1936.

[2] 215 I.C.C. 797: "In the *Southeastern case* we found that in addition to the cost of ice, the refrigeration charge should include the cost of switching, haulage of ice, bunker repairs, supervision, and hazard. We have found the cost of these elements, also the cost of station and auditors accounting, to be proper charges in this case, and have set forth in preceding chapters of this report the cost per car, per ton, per icing, or per ton-mile, of each element. These costs have been taken into consideration in arriving at the specific Section 2 charges herein prescribed. Charges to cover these costs, except the cost of hazard, should be published in Section 4 for appropriate application to shipments moving under that section."

See also footnote 7, page 13 Statement as to Jurisdiction, quoting the finding thereon in the Docket 31342 report.

service and rates includes interest or a return on investment in all capital assets used in furnishing such service.

Thus, while the Perishable Protective Tariff publishes "Section 2" refrigeration charges in connection with fresh fruits and vegetables, berries, melons, and processed foods and "Section 4" refrigeration charges for all other commodities such as fresh meats and packinghouse products, the elements of cost for performing the icing service are exactly the same. As was said by the Commission in the instant proceeding, 297 I.C.C. 505, 506-507:

> "The prescribed charges were predicated on the determination that they should be sufficient to cover the cost thereof plus a fair return on the investment in facilities required for the performance of the services. Being accessorial to the basic line-haul service, these charges were prescribed as exact charges, necessary to cover the additional cost incurred by the carriers in performing the services. Also set forth were unit cost of the several elements that had been recognized as contributing to the cost of rendering refrigeration service, in connection with which it was concluded that the application of such of those unit costs as might be pertinent to the particular class of service used would indicate the proper charge."

The proper charge for one refrigeration service differs from charges for other such services only because different elements of service are involved. The amount of the cost of each element of service is identical regardless of the type of refrigeration service to which the particular element is applicable. But with the variations in the number of character of elements of service performed in each different type of

refrigeration service, the total cost of a particular service varies from that of another and the charges must necessarily vary according to such variations of total cost. "The charges for the various refrigeration services differ widely dependent upon the character of the service rendered" (297 I.C.C. 508). The range of the charges is "from about 15 to 85 percent of the charge for standard refrigeration between the same points." "There are about six different sets of charges" (for standard refrigeration service) "dependent partly upon the commodity involved." (297 I.C.C. 508).

Different amounts are charged for standard refrigeration service on apples, citrus fruits (iced after being loaded), citrus fruits (in pre-iced cars), deciduous fruits, melons, and vegetables (see Table on page 791 of 215 I.C.C. Lesser amounts are charged for lesser service. Rule 240, initial ice—do not re-ice—provides one charge if the shipper furnishes the initial ice, and a higher charge if the ice be furnished by the carriers. Rules 242 and 243 provide a charge for "top or body icing service" with the ice being furnished by the shipper. The four variables are the commodity, the origin, the destination, and the type of refrigeration service rendered.

NATURE AND CHARACTER OF PROCEEDING BEFORE COMMISSION

Docket 31342, *Proposed Increased Refrigeration Charges*, 297 I.C.C. 505, in which the assailed order of January 9, 1956, was entered, was an entirely different proceeding, in every respect, from the "general revenue" proceedings.

The Railroad petition, filed under Section 13 of the Interstate Commerce Act, prayed that the Commis-

sion "institute an investigation" and "determine and find that the increased charges here proposed will be just and reasonable" (see pages 10, 11 Statement as to Jurisdiction), and the substance and effect of the consequent proceedings, report and order of the Commission clearly made Docket 31342 a rate case, as distinguished from a general revenue case.

The Railroad petition set forth their initial proposal.[3] "Generally, the proposal was to increase by 30 percent, with certain exceptions, the charges published in Section 2 of the perishable Protective Tariff, . . . and to increase by specified amounts the charges published in Section 4 of the same tariff" (pages 3-4, Railroads' Motion to Affirm). The latter part of the proposal is important, a proposal to increase charges for ice in California, for example, from $4.04 to $5.07 per ton and in Florida from $5.49 to $5.72 per ton. The Commission denied both, disallowing the 30% and disapproving the specific increases in charges per ton of ice, but substituting a substantial increase of 15% applying uniformly on all of the refrigeration services regardless of cost.

At the outset of the hearings, counsel for the Railroads specifically disclaimed all contention that the proceeding was a general revenue case.[4]

The Commission found "that the application of such of those unit costs as might be pertinent to the particular class of service used would indicate the proper charge," (297 I.C.C. 507), and ignored that

[3] Set forth in detail in Appendix A to the Commission's report, 297 I.C.C. 556-557—Appendix II to Statement as to Jurisdiction.

[4] R. 271: "Mr. Bierma (counsel for railroads): We don't view this as a general revenue case, Mr. Examiner."

finding in concluding that a uniform nation-wide increase of 15% was authorized as to charges for all services alike.

It found that refrigeration charges should "cover the additional cost incurred by the carriers in performing the services" (297 I.C.C. 507); such return of full cost not being the same but entirely different from a general revenue case.

It found: "The charges for the various refrigeration services differ widely dependent upon the character of the service rendered" (297 I.C.C. 508); but disregarded that finding.

It found that the "petitioners' traffic study" embraced only "shipments accorded bunker re-icing service" (297 I.C.C. 511) and that none of the other shipments such as rules 240, 242 and 243 ("which approximated 43 percent of the total"—297 I.C.C. 518) were included, but disregarded that basic fact and authorized the application of the 15% increase, derived from the bunker re-icing traffic study, also to services having no bunker re-icing nor any icing whatever by the carriers.[5]

It found as to the bunker re-iced shipments in the traffic study that the railroad computed deficits varied as to different services—30.6%, 24.1%, 12.2%, 33.7%, 7.2%, 12.3%, 6.7%, 22.1%, 23.6%—and as between commodities "ranges from a minimum of 12.75 percent for apples to a maximum of 76.77 percent for frozen foods" (297 I.C.C. 517); but, after finding that

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[5] As shown by the footnote, page 21 Statement as to Jurisdiction, 55.97% of vegetables from Florida moved under Rule 240 or Rule 243.

the Railroad computed costs were too high, refused to give effect to the wide differences between commodities and between services and authorized a uniform percentage increase thereby charging high cost services and commodities less than cost and penalizing the low cost ones for the benefit and advantage of the high cost ones. It found that "the revenue deficit estimated by petitioners, in the rendition" of half-stage refrigeration service was 44.8 percent, "relatively greater than that incurred in connection with any of the other services" (297 I.C.C. 519); but authorized a uniform percentage increase for application to all services alike, regardless of origin, length of haul, commodity, type of service, etc.

It restated the cost of ice per ton, by "groups," group 1—California, group 4—Florida, group 10—including Texas (297 I.C.C. 532); but authorized greater charges than the restated cost in each of such three groups, the higher charges resulting because of the application of a uniform percentage increase.[6]

It found the cost of salt to be $1.04 per 100 pounds (297 I.C.C. 533); and authorized an increase from 99¢ to $1.04 (or 5.05%) on Section 4 charges therefor, but an increase of 15% on Section 2 charges.

It found: "The evidence presented is insufficient to permit a determination of accurate costs (of switching) prerequisite to the authorization of the specified

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[6] The departure from the established norm is not explained. 215 I.C.C. 731: "Costs in Florida are lower than in other southern states, except South Carolina, and it is considered proper to give the shippers who initiate a large volume of traffic in that state the full benefit of their location, in the same manner as proposed with respect to California." That principle enunciated in 1936 in Docket 20769 is destroyed in Docket 31342, even though the standards of the Act support the Docket 20769 principle.

charges proposed" (297 I.C.C. 535); but authorized an increase of 15% in Section 4 switching charges, and in the restatement of costs on the Section 2 traffic study used "the prescribed charges plus the cumulative increases"—a percentage increase of 46% for Section 2 in contrast with 15% for Section 4.[7]

The Commission found: "The Section 2 charges, as noted, cover the several enumerated elements of expense, while the Section 4 charges cover only the elements of ice, salt, and switching. The elements of expense for supervision, station and auditors accounting, and ice haulage, which are covered by the Section 2 charges, but not included in the Section 4 charges, amount to about 19 percent thereof." (297 I.C.C. 523). It also found: "After extensive investigations in the prior proceedings, we made definite determinations as to the costs of the several elements of expense and required the establishment of charges accessorial to the line-haul rates to compensate those costs on both Section 2 and Section 4 traffic" (297 I.C.C. 524).

The Commission made findings as to the increased cost of supervision (297 I.C.C. 536), haulage of ice (297 I.C.C. 539), and Station and auditor's accounting (297 I.C.C. 540).[8] Such increased cost factors

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[7] The footnote, page 18, Railroads' Motion to Affirm attempts to mitigate the result, by concluding that Section 2 charges were only increased 15% in contrast to 23.9% loss computed by use of 46% increase in the switching factor. If the 46% be reduced in the relation that 23.9 bears to 15, it still remains that Section 2 switching would be increased 29.13% instead of the 15% increase for Section 4 switching charges.

[8] "There is insufficient cost data to justify any charge for this element of expense (station and auditors accounting cost) in excess of the prescribed charge plus the cumulative increases authorized for general application on other traffic."

were used in arriving at estimates of total computed cost on bunker re-iced Section 2 traffic. The Commission, without any further explanation, then concluded to authorize an increase of the same percentage on section 2 and section 4 charges although no charges for those factors were required for section 4 services.

The Commission purported to state the "cost" of ice computed by petitioners for the sample Section 2 bunker re-iced shipments, it then made an "adjustment" thereto and to certain other elements, and arrived at an "adjusted cost" (297 I.C.C. 543). "The ice-cost formula is (was) designed to develop at each icing station the cost of" ice, including "such elements as return on investment, depreciation, interest on working capital, cost of transporting ice to platforms, labor of icing cars, indirect costs, and taxes" (297 I.C.C. 526). That "cost" of ice at "each icing station" ("more than 2,000 reports" 297 I.C.C. 511) was not used in any computation of costs for any Section 2 traffic. On the contrary, group averages for ice costs were employed by the carriers and the Commission (297 I.C.C. 512 and 543).[9]

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[9] See footnote 11, page 20, Statement as to Jurisdiction. The mere difference in method, i.e. using group averages embracing States as far removed geographically from each other as Mississippi and Maine, Maryland and Michigan, instead of the actual, average cost of ice furnished at particular icing stations, produces widely variant results.

Railroad average cost for group 8	$7.03
Commission restated average-group 8	6.91
Railroad average, all stations in Virginia	5.87
Railroad average for Potomac yard Virginia	4.83

Thus for ice furnished at Potomac Yard, Virginia, at an actual average cost of $4.83 per ton, the railroads' computation used the "group average of $7.03."

To the extent that the evidence received by the Commission was adequate to prove anything, it covered the individual elements of cost and the specific re-icing services by commodities and territorial groups. The Commission made findings with respect to the individual elements of cost. Then instead of making findings with respect to appropriate rates for specific services, it ignored its findings as to elements of cost and the evidence as to specific services and allowed a 15% increase in all rates. It now seeks to justify that conclusion on the ground that the proceeding was a general revenue case.

All of the evidence and all of the Commission's findings with respect to the elements of cost were appropriate in and characteristic of a rate case—not a general revenue case. For the latter the usual evidence is a showing of financial condition of the carriers and their revenue needs. No evidence whatever of this character was presented to the Commission. It made no findings with respect to financial condition or revenue needs of either the carriers or the carlines, the latter being the primary beneficiaries of all refrigeration rates. Obviously the total refrigeration traffic furnishes such a small segment of total freight revenue (less than ½ of 1 percent) that an increase in refrigeration could not possibly have a significant effect upon the financial conditions or the revenue needs of the carriers as a whole.

Thus the present proceeding before the Commission, in its pleadings, in the character of evidence presented, in the nature of the findings made by the Commission and in the effect of the decision upon the rates involved, was a rate case and not a general revenue case.

THE DISTRICT COURT DECISION

The complaint seeking to enjoin, annul, and set aside the Commission's order was dismissed, *Florida Citrus Commission et al.* v. *United States, et al.*, 144 F. Supp. 517, because of reliance by the three judge court upon an erroneous conception of the nature, substance and effect of the Commission's order.

It is conceded by the Motions to Affirm that "the district court held (Jur. St. 5a-11a) that the Commission's proceeding was a 'general revenue' proceeding rather than one to determine the reasonableness of specific rates" (U.S.-I.C.C. Motion p. 3); that the appellants' contention is "that the district court erred in treating the Commission proceeding as a 'general revenue' case rather than as a 'rate' case, and consequently in considering only the propriety of the general increase and in refusing to consider the reasonableness of the application of that increase to individual rates" (U.S.-I.C.C. Motion p. 4); that the district court "held that this was a 'general revenue' case" (Ibid. p. 4), and that (on the erroneous assumption that "this was a 'revenue' case") the district court "limited itself to determining the validity of the general increase, and refused to consider the effect of such increase upon particular rates" (Ibid, p. 6).

Likewise, the Railroads' Motion to Affirm concedes that the District Court held that "the proceeding before the Commission was a general revenue proceeding; that the Commission's order was permissive in character; that the lawfulness of individual charges was not considered or decided" (Railroads' Motion p. 7). Also, the Railroad's Motion (p. 8) reiterates their position "that the Commission's order is permissive only" and the fact "that the Commission did

not pass upon the lawfulness or reasonableness of individual charges for any specific type or character of refrigeration service."

That these are substantial questions, entitling appellants to judicial review, is clearly shown by the Jurisdictional Statement and by what is set forth in this brief as to the specific findings and conclusions in the Commission's report. Those show affirmatively that the performance of its duty under the law required the Commission to deny a uniform percentage increase, and to conclude that the increased charges for various type of services above the actual cost thereof should have been denied.[10]

The district court's decision is not susceptible to any construction that it "fully considered the validity of the Commission's order" nor that it "held that the findings were sufficient to support the order and had an adequate evidentiary basis" (U.S. I.C.C. Motion p. 4). Neither is the Railroads' contention (R.R. Motion p. 6) correct that the district court did not fail "to consider the merits of the case."

What is said in the district court's opinion must be read in the light of its erroneous views that this is a "general revenue" case and that "typical evidence justifying general findings" was before the Commission and spelled out in the Commission report. It is true that the district court prefaced its discussion (p.

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[10] "This was not a full discharge by the Commission of an immediate responsibility. It was inaction and postponement. Responsibility was shifted from the shoulders of the present to the shoulders of the day to come." *United States* v. *Chicago M. St. P. & P. R. Co.*, 294 U. S. 499, 79 L. ed. 1023.

11a, Appendix I to Statement as to Jurisdiction) with the following language:

> "We come now to the contention of the plaintiffs that *if we should hold this to be a case governed by the doctrines of the general revenue cases*, and we do so hold, nevertheless the evidence does not show nor the findings support the Commission's conclusions or warrant the entry of its order." (Emphasis supplied)

On the question of discrimination between Section 2 and Section 4 charges for refrigeration, the district court said (p. 13a, Appendix I to Jur. St.):

> "It is true that Section 4 charges reflect only the cost of ice and salt, and the cost of switching, while Section 2 charges include also ice haulage, bunker damage, supervision and other elements. If there be any discrimination between Section 2 and Section 4 traffic, and *this we do not decide*, it is a discrimination which existed prior to the proceedings before the Commission whence issued the order under attack. Such discrimination, if any there be, did not result from nor was it substantially altered by the Commission's order." (Emphasis supplied.)

The district court thus, as shown by its own language, failed to determine whether there was discrimination contrary to Sections 2 and 3 of the Act. It overlooked the facts, found by the Commission's report, that three of the factors excluded from Section 4 charges constitute 19% of the Section 2 costs, that "it is not apparent that the unit costs of providing the individual elements of service are different for the various services," (297 I.C.C. 519), and that the entire discrimination has not heretofore existed but is enhanced and increased by the Commission's order. The

elements of supervision, haulage of ice, station and auditor's accounting, etc., are *increased* by the order as to Section 2 charges, whereas Section 4 charges under the same order will continue without any charge therefor.

The Commission erroneously concluded "that the Section 2 and Section 4 charges do not apply on like traffic" (297 I.C.C. 524). See *Secretary of Agriculture* v. *United States*, 347 U.S. 645, 74 S. Ct. 826, 98 L. Ed. 1015; and *Seaboard Air Line Ry. Co.* v. *United States*, 254 U.S. 57, 65 L. ed. 129.[11]

It was affirmatively said by the Commission in its report (297 I.C.C. 524):

> "After extensive investigations in the prior proceedings, we made definite determinations as to the costs of the several elements of expense and required the establishment of charges accessorial to the line-haul rates to compensate those costs on both Section 2 and Section 4 traffic."[12]

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[11] 254 U.S. 57, 62: "We are of the opinion that the Commission was correct in regarding the service in question as a like and contemporaneous service rendered under substantially similar circumstances and conditions. * * * The principle established in these cases is that the statute aims to establish equality of rights among shippers for carriage under substantially similar circumstances and conditions."

[12] The contention in the Meat Packers Motion to Affirm that line-haul rates include some amount for compensating refrigeration costs against Section 4 traffic exists only in the argument of counsel. It is not only not supported by any findings in the Commission's report in Docket 31342 but also is directly contrary to affirmative findings in Docket 20796, 241 I.C.C. 503 and 253 I.C.C. 351. The principle followed by the Commission, in conformity with the law, was stated in the original report in Docket 20769, 215 I.C.C. 684, 796, in the following language: "It is wholly impracticable to include in line-haul rates specific amounts to cover refrigeration costs. The identity of whatever amount that might

The district court correctly said (Statement as to Jurisdiction, 16a-App. I): "It has been settled that the Interstate Commerce Commission is without power to award reparations with respect to shipments which moved under rates approved or prescribed by it. *Arizona Grocery Co.* v. *Atchison, Topeka & Santa Fe Railway Co.*, 284 U.S. 370, 52 S. Ct. 183, 76 L. ed. 348." The non-applicability of that principle was determined by the district court on its erroneous assumption that this is a "general revenue case" and the order merely a permissive one—see page 23 Jur. St.

Appellants have not contended that the Interstate Commerce Commission cannot "deal generally with rates and revenues in a large area on evidence typical of the area as a whole" or "on evidence deemed typical of the whole rate structure" (U.S.-I.C.C. Motion p. 5). However, in the case at bar, the traffic study of bunker re-iced shipments only cannot possibly be said to be typical of refrigerated shipments which do not involve bunker re-icing nor any icing at all by the railroads. Furthermore, average costs of ice in a large group cannot be accepted as typical or lawful substitutes for costs of ice furnished in a specific service.[13]

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in the first instance be included in a line-haul rate to cover refrigeration service would sooner or later be lost in the inevitable readjustments to which line-haul rates are subject. Doubtless this has occurred to a greater or lesser extent wherever an attempt has been made to so handle such costs in the past, with consequent loss to the carriers and undue advantage to shippers who have used Section 4 service as compared with shippers who were under the necessity of using Section 2 service."

[13] In *Brimstone Railroad & Canal Co.* v. *United States*, 276 U.S. 104, 72 L. Ed. 487, quotation with approval was made from a former decision: "Evidence of individual rates or divisions, said to be typical of all, affords a basis for finding as to any one. But averages are apt to be misleading. * * * but it was not proper to

ADMINISTRATIVE NECESSITIES

Great emphasis is laid, in the Motions to Affirm by United States Interstate Commerce Commission and by the Railroad appellees, upon the doctrine of administrative necessities, which when properly applied permits the adjudication of issues, involving a multitude of details, upon evidence, deemed typical of the whole.[14]

So far as has come to our knowledge, there has never been a decision of this Court extending the doctrine to a case such as the one at bar—far beyond the original scope and applicability of the rule. The doctrine is not a substitute for evidence, nor does it authorize, contrary to the mandate of the Interstate Commerce Act, that rates and charges shall be just and reasonable

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accept them (aggregate results) as a substitute for typical evidence as to the individual joint rates and divisions."

See also, *Northern Pac.* v. *Department Public Works*, 268 U.S. 39.

[14] *New England Divisions Case*, 261 U.S. 184, 197-199: "For many years before the enactment of Transportation Act, 1920, it had been necessary, from time to time, to adjudicate comprehensively upon substantially all rates in a large territory. When such rate changes were applied for, the Commission made them by a single order; and, in large part, on evidence deemed typical of the whole rate structure. * * * It was the actual necessities of procedure and administration which had led to the adoption of that method in passing upon the reasonableness of proposed rate increases. * * * That there is no constitutional obstacle to the adoption of the method pursued is clear. Congress may, consistently with the due process clause, create rebuttable presumptions. * * * It might, therefore, have declared in terms, that if the Commission finds that evidence introduced is typical of traffic and operating conditions, and of the joint rates and divisions, of the carriers of a group, it may be accepted as *prima facie* evidence bearing upon the proper divisions of each joint rate of every carrier in that group. Congress did so provide, in effect, when it imposed upon the Commission the duty of determining the divisions. For only in that way could the task be performed."

and non-discriminatory, the approval of blanket increases to all rates and charges of a particular class in the face of evidence and findings to the contrary. Evidence of a traffic sample intentionally restricted to certain "bunker re-iced" shipments cannot possibly be assumed to be typical of the substantial volume (43% nationwide, and nearly 56% in Florida) of Rule 240 and Rules 242-243 refrigerated shipments for which there is no bunker re-icing and in fact no icing whatever by the carrier. (On bunker re-iced shipments, the "cost of ice" is approximately 63% of the total cost.)

Neither is there any justification for accepting widespread area or "group" averages as being identical with or typical of costs actually incurred, particularly when it affirmatively appears that the actual cost at particular stations is vastly different from the average for the entire "group" in which that station happens arbitrarily to be located.

In *United States* v. *Louisiana*, 290 U.S. 70, 77, 78 L. ed. 181, this Court approved the Commission's "exercise of its power to prescribe reasonable rates," it having been done "in conformity to the administrative necessities." There, however, there was "an acute emergency calling for prompt action" and the ultimate finding was "accompanied by suitable reservation of the right of all interested parties to secure modification of any particular rate, which, when challenged, is found unjust or unreasonable." In the case at bar, there was no such reservation, and, to the contrary, when the invalidity of particular increased rates was pointed out by petitions for reconsideration they were summarily denied even before the time for reply thereto had expired.

In the *Louisiana Case*, it was specifically pointed out that the "natural construction" of Sec. 15a(2) of the Act makes "possible its practical operation," but the section "does not relieve the Commission from the responsibility of seeing to it that the rates as increased are to be reasonable." (p. 76).

How possibly can it be said, for example, that the tariff "Section 4" charges for ice in Florida and California, as increased by the authorized 15%, are just and reasonable, when the Commission's own finding and "restated cost" is admittedly less than such increased charges?

Of course, "the extent of this inquiry and the detail of investigation cannot be marked by this Court with certainty." The standards for measurement were set forth by the Court and readily can be and must be followed, viz: "The size of the group dealt with, the nature of the traffic, the urgency of the relief demanded, these and other factors should condition the Commission's procedure in each case." *Louisiana* v. *U. S., supra,* at p. 77.

The nature of the procedure to be followed is not subject to speculation or conjecture, but is the procedure followed in every former case involving refrigeration charges for nearly thirty years. It is simple and practical, and calculated to do justice to both shippers and carriers. It consists merely of a proper determination of the amounts of the unit costs of the various elements of service in refrigeration charges, and secondly the application of those unit costs to such service elements as are involved in a particular type of refrigeration service. The principle was stated in this proceeding (297 I.C.C. 507), as follows:

"The application of such of those unit costs as might be pertinent to the particular class of service used would indicate the proper charge."

The procedure is not new. It was used by the Commission in Docket 17936, 151 I.C.C. 649, decided February 12, 1929. There, the Commission prescribed standard refrigeration charges separately on citrus fruits and vegetables from Florida, on fruits, vegetables, berries and melons from Georgia, on fruits, berries and melons from South Carolina, on vegetables from South Carolina, on berries from North Carolina, on vegetables and melons from North Carolina, on fruits from North Carolina, and on fruits, berries, vegetables and melons from certain points in Virginia, to specified destinations. Each level of charges was designed to reflect the cost, as there ascertained, of the particular service. There were "limitations of the record," which "was largely confined to standard refrigeration service and to traffic moving through Potomac Yard and Norfolk," and therefore the Commission properly restricted its findings "to charges for such service from the origin territory involved to destinations in trunkline and New England territories" (151 I.C.C. 695). Then, the Commission further said:

"However, it will not be difficult for respondents to readjust their charges for other forms of refrigeration service and to destinations in central territory in line with these findings, and this should be done. In this connection it should be noted that the factors which we have arrived at for bunker repairs, supervision, hazard or risk, taxes, and profit are factors which were based upon data covering the operations of the express company in general, and hence they may be applied without change to traffic destined to central-territory points. This is not true of the factors

> for cost of ice, haulage of ice, and switching, but respondents can obtain the data necessary for the adjustment of these factors to traffic other than that covered by our findings."

In a similar manner, and by comparable procedure, the Commission in Docket 20769, *Charges for Protective Service to Perishable Freight*, 215 I.C.C. 684, (a) determined and set forth the cost of the several elements entering into the furnishing of refrigeration service throughout the country, (b) prescribed reasonable charges for standard refrigeration service on apples, citrus fruits, deciduous fruits, melons, and vegetables from Arizona and California to destinations in the Denver, Colorado group and to destinations in specified groups east thereof, (c) indicated the basis for such charges to other destination territory, (d) prescribed reasonable charges under Rules 240, 242, 245, 247 and 249, where applicable, to certain territory, (e) directed that the indicated unit costs be applied by carriers to arrive at charges to other destinations, and (f) required that charges for service under Section 4 of the tariff be the full cost of furnishing that service.

Thus, it is obvious from the actual experience of Dockets 17936 and 20769 that the simple and practical procedure there followed operates to produce reasonable and lawful results.

In addition, it is obvious too that a refrigeration rate structure which initially varied in level or amount depending upon the commodity, the origin, the destination, and the type of service, cannot be increased by a uniform percentage—particularly when it is shown that there are widely different relationships today between the present day costs and the tariff charges pro-

posed to be increased. More accurately, it should be said that a uniform percentage cannot possibly be applied to such varying charges, if the transportation standards of the Act are to be observed. This conclusion is what is expressed in somewhat different language in the dissenting opinion of Commissioner (now Chairman) Clarke, 297 I.C.C. 555-556.

CONCLUSION

The increased "section 2" refrigeration charges involved here affect all fresh fruits and vegetables and frozen foods throughout the United States. Of course, some such traffic is accorded ventilation or heater service during certain seasons of the year, but the great bulk of it moves under refrigeration (297 I.C.C. 509). After naming the protestants who participated in the hearings before the Commission, the report shows (297 I.C.C. 522):

> "This representation embraces practically all the growers, shippers and processors of fruits, fruit juices and concentrates, vegetables, and frozen foods in Florida, Texas, Arizona, California, Oregon, and Washington. . . . "

In short, they are the parties who are denied the use of more favorable "section 4" refrigeration services, accorded to the Meat Packers. They are the ones, who, as a result of the Commission's order, are subjected "to damage which is substantial, immediate and irreparable." "The order is final, not tentative." "It was entered as the result of a formal controversy." "It marked the disposition of the controversy, not a preliminary stage."[15]

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[15] Quotations from *Alton Railroad* v. *United States*, 287 U.S. 229, 77 L. ed. 275.

No doubt, even after making the findings, determinations and declarations set forth in its report, it may have been simpler and "more convenient" for the Commission to evade tailoring its order to fit its findings and the several section 2 refrigeration charges and services separately and consequently merely to authorize a blanket, uniform increase applicable alike to all services and charges, regardless of relationship to unit costs found by the Commission and despite the fact that the resultant charges would be greater in many instances than total cost. However, "the convenience of the Commission or court is not the measure of justice." *Interstate Commerce Commission* v. *Stickney*, 215 U.S. 98, 54 L. ed. 112.

The order here assailed differs essentially from all those held by this Court to be not subject to judicial review. It was not "merely the formal record of conclusions reached after a study of data collected in the course of extensive research conducted by the Commission, through its employees," nor was it "merely preparation for possible action in some proceeding which may be instituted in the future"—as in *United States* v. *Los Angeles & S.L.R. Co.*, 273 U.S. 299, 71 L. ed. 651.

The order granted authority, and the Commission's report (made a part of the order) determined rights and obligations. The Commission's action was followed by legal consequences. It is reviewable under the principles enunciated in *Rochester Telephone Corp.* v. *United States*, 307 U.S. 125, 130, 83 L. ed. 1147.

The plaintiffs' (Appellants') rights are affected immediately, and are not contingent upon "future ad-

ministrative action." The order was an exercise, by the Commission, "of the delegated legislative function of rate making and rule making." "Here the Commission exercised its (rate-making and) rule-making power by" entering the order "whose operation is not made subject to future administrative determination." The order's "applicability to all who are within its terms does not depend upon future administrative action." Instead it operates "to control such action and to determine in advance the rights of others affected by it." The order is "the effective implement by which the injury complained of is wrought." The order definitely determined and fixed the amounts of the unit costs of elements entering into the construction of refrigeration charges, failed to apply the unit costs thus determined, and disregarded their applicability to the separate, several and different refrigeration services and charges. (Quotations taken from *Columbia System* v. *U. S.*, 316 U.S. 407, 418-420).[16]

The district court erroneously held, and appellees continue to argue, that the order is not reviewable because, they say, it is a "permissive" one. Regardless of the fact that the ancient distinction between an "affirmative" and a "negative" order no longer con-

[16] To maintain the action in the three-judge district court, "it is enough that, by setting the controlling standards for the Commission's action, the regulations purport to alter and affect adversely appellant's contractual rights and business relations * * *. The ultimate test of reviewability is not to be found in an overrefined technique, but in the need of the review to protect from the irreparable injury threatened in the exceptional case by administrative rulings which attach legal consequences to action taken in advance of other hearings and adjudications that may follow, the results of which the regulations purport to control." *Columbia Broadcasting System* v. *United States*, 316 U.S. 407, 422, 425; 86 L. ed. 1563.

trols, it is respectfully submitted that "here the order complained of is an affirmative one. That is, it grants the relief sought." *Chicago Junction Case* (*Baltimore & O. R. Co.* v. *United States*), 264 U.S. 258, 264, 68 L. ed. 667. (p. 263):

> "Rate orders are clearly legislative. * * * Nor would the further fact that the order is permissive preclude review, if by that term is meant an order which, in contradistinction to one compelling performance, authorizes a carrier to do some act otherwise prohibited."

Clearly, a hearing by the Commission was prayed for by the Railroads' petition, and thereupon required by the Interstate Commerce Act. "The provision for a hearing implies both the privilege of introducing evidence and the duty of deciding in accordance with it." (264 U.S. 265)

See, also, pages 30-33, Statement as to Jurisdiction.

Substantial questions as to the validity of the authorized charges under sections 1, 2 and 3 of the Act are presented by the complaint to the district court and by this appeal. Not only are some, at the least, of the approved "section 2" increased refrigeration charges grossly unjust and unreasonable, but also the increased charges resulting from the Commission's order violates the basic intent and purpose of the Interstate Commerce Act—and prejudices between commodities, services, shippers, regions, and territories.

> "Congress, by adding those words 'region, district, territory' to sec. 3(1), made plain the duty of the Commission in determining whether discriminatory practices exist, to consider the interest of regions, districts, and territories, and to eliminate territorial conditions. * * * As we said

earlier, sec. 3(1) does not dictate a policy of national uniformity in rates: it only requires that the lack of uniformity in rates among and between territories be justified by territorial conditions." *New York* v. *United States,* 331 U.S. 284, 300, 350; 91 L. ed. 1492.

It is respectfully submitted that the Commission's order of January 9, 1956, in Docket 31342, is a "justifiable" one, reviewable by the districts courts under 28 U.S. Code sec. 1336, and presents such additional substantial questions indicating the invalidity of such order affecting detrimentally the entire fresh fruit and vegetable industries of our nation, as to warrant the denial of Motions to Affirm and the noting of probable jurisdiction.

Respectfully submitted,

M. W. Wells
Maguire, Voorhis & Wells
135 Wall Street (P. O. Box 633)
Orlando, Florida

Lewis W. Petteway
General Counsel
R. Y. Patterson Jr.
Assistant General Counsel
Florida Railroad & Public Utilities Commission
Tallahassee, Florida

Karl D. Loos
Pope, Ballard & Loos
707 Munsey Building
Washington 4, D. C.

Frank C. Brooks
Hugh T. Matthews, Jr.
Callaway, Reed, Kidwell & Brooks
305 Empire Bank Bldg.
Dallas, Texas

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